

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 8, 2010

TO: Persons on the attached mailing list.

RE: CEMEX Cement of Texas, L.P.
TPDES Permit No. WQ0002179000

Decision of the Executive Director.

The executive director has made a decision that the above-referenced permit application meets the requirements of applicable law. **This decision does not authorize construction or operation of any proposed facilities.** Unless a timely request for contested case hearing or reconsideration is received (see below), the TCEQ executive director will act on the application and issue the permit.

Enclosed with this letter is a copy of the Executive Director's Response to Comments. A copy of the complete application, draft permit and related documents, including public comments, is available for review at the TCEQ Central office. A copy of the complete application, the draft permit, and executive director's preliminary decision are available for viewing and copying at New Braunfels Public Library, 700 Common Street, New Braunfels, Texas.

If you disagree with the executive director's decision, and you believe you are an "affected person" as defined below, you may request a contested case hearing. In addition, anyone may request reconsideration of the executive director's decision. A brief description of the procedures for these two requests follows.

How To Request a Contested Case Hearing.

It is important that your request include all the information that supports your right to a contested case hearing. You must demonstrate that you meet the applicable legal requirements to have your hearing request granted. The commission's consideration of your request will be based on the information you provide.

The request must include the following:

- (1) Your name, address, daytime telephone number, and, if possible, a fax number.
- (2) If the request is made by a group or association, the request must identify:
 - (A) one person by name, address, daytime telephone number, and, if possible, the fax number, of the person who will be responsible for receiving all communications and documents for the group; and
 - (B) one or more members of the group that would otherwise have standing to request a hearing in their own right. The interests the group seeks to protect must relate to the organization's purpose. Neither the claim asserted nor the relief requested must require the participation of the individual members in the case.
- (3) The name of the applicant, the permit number and other numbers listed above so that your request may be processed properly.
- (4) A statement clearly expressing that you are requesting a contested case hearing. For example, the following statement would be sufficient: "I request a contested case hearing."

Your request must demonstrate that you are an **"affected person."** An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. Your request must describe how and why you would be adversely affected by the proposed facility or activity in a manner not common to the general public. For example, to the extent your request is based on these concerns, you should describe the likely impact on your health, safety, or uses of your property which may be adversely affected by the proposed facility or activities. To demonstrate that you have a personal justiciable interest, you must state, as specifically as you are able, your location and the distance between your location and the proposed facility or activities.

Your request must raise disputed issues of fact that are relevant and material to the commission's decision on this application. The request must be based on issues that were raised during the comment period. The request cannot be based solely on issues raised in comments that have been withdrawn. The enclosed Response to Comments will allow you to determine the issues that were raised during the comment period and whether all comments raising an issue have been withdrawn. The public comments filed for this application are available for review and copying at the Chief Clerk's office at the address below.

To facilitate the commission's determination of the number and scope of issues to be referred to hearing, you should: 1) specify any of the executive director's responses to comments that you dispute; and 2) the factual basis of the dispute. In addition, you should list, to the extent possible, any disputed issues of law or policy.

How To Request Reconsideration of the Executive Director's Decision.

Unlike a request for a contested case hearing, anyone may request reconsideration of the executive director's decision. A request for reconsideration should contain your name, address, daytime phone number, and, if possible, your fax number. The request must state that you are requesting reconsideration of the executive director's decision, and must explain why you believe the decision should be reconsidered.

Deadline for Submitting Requests.

A request for a contested case hearing or reconsideration of the executive director's decision must be **received** by the Chief Clerk's office no later than **30 calendar days** after the date of this letter. You may submit your request electronically at <http://www.tceq.state.tx.us/about/comments.html> or by mail to the following address:

LaDonna Castañuela, Chief Clerk
TCEQ, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

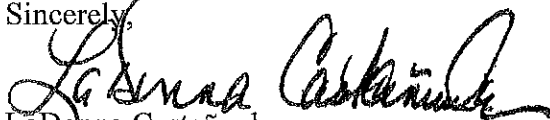
Processing of Requests.

Timely requests for a contested case hearing or for reconsideration of the executive director's decision will be referred to the alternative dispute resolution director and set on the agenda of one of the commission's regularly scheduled meetings. Additional instructions explaining these procedures will be sent to the attached mailing list when this meeting has been scheduled.

How to Obtain Additional Information.

If you have any questions or need additional information about the procedures described in this letter, please call the Office of Public Assistance, Toll Free, at 1-800-687-4040.

Sincerely,


LaDonna Castañuela
Chief Clerk

LDC/ka

Enclosures

MAILING LIST
for
CEMEX Cement of Texas, L.P.
TPDES Permit No. WQ0002179000

FOR THE APPLICANT:

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New Braunfels, Texas 78132

Michael Bohmfalk
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Austin, Texas 78746

PROTESTANTS/INTERESTED PERSONS:

Michael E. Morrison, City Manager
City of New Braunfels
P.O. Box 311747
New Braunfels, Texas 78131-1747

Joseph Hager
Schoenthal Ranch Community Association
13025 Tonne Drive, E
New Braunfels, Texas 78132-4561

Tim Fey
Sharlene Fey
6028 Farm-to-Market Road 482
New Braunfels, Texas 78132-4542

Janis Rosebush
The Touch of a Rose Massage
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FOR THE EXECUTIVE DIRECTOR
via electronic mail:

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FOR THE CHIEF CLERK
via electronic mail:

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Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087

TPDES PERMIT NO. WQ0002179000

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| APPLICATION BY | § | BEFORE THE | CHIEF CLERKS OFFICE |
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| CEMEX CEMENT OF TEXAS, L.P. | § | TEXAS COMMISSION ON | |
| | § | | |
| TPDES PERMIT NO. WQ0002179000 | § | ENVIRONMENTAL QUALITY | |
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EXECUTIVE DIRECTOR'S RESPONSE TO PUBLIC COMMENT

The Executive Director (ED) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Public Comment (Response) on CEMEX Cement of Texas, L.P.'s (Applicant) application and the ED's preliminary decision. As required by 30 Texas Administrative Code (TAC) Section (§) 55.156, before an application is approved, the ED prepares a response to all timely, relevant and material, or significant comments. The Office of Chief Clerk timely received comment letters from: Janis Rosebush, Tim & Sharlene Fey, Joseph Hager (on behalf of the Schoenthal Ranch Community), and Michael E. Morrison, City Manager, City of new Braunfels, Texas. This response addresses all such timely public comments received, whether or not withdrawn. If you need more information about this permit application or the wastewater permitting process, please call the TCEQ Office of Public Assistance at 1-800-687-4040. General information about the TCEQ can be found at our website at www.tceq.state.tx.us.

BACKGROUND

Description of Facility

CEMEX Cement of Texas, L.P., has applied to the TCEQ for a major amendment with renewal to TPDES Permit No. WQ0002179000 to authorize the discharge of storm water from two new areas of the facility via Outfall 001; to authorize reuse of wastewater for on-site landscaping and irrigation; and to authorize the discharge of truck wash water from CEMEX Construction Materials, Inc. Quarry via Outfall 001. The draft permit, if issued would authorize discharges from Outfall 001 at an intermittent and flow variable rate. The current permit authorizes the discharge of wash water from the plant process and truck wash areas and storm water from plant and material/product storage areas via Outfall 001.

The facility is located at 2580 Wald Road, at the intersection of Wald Road and Solms Road, approximately 0.75 miles north of Interstate Highway 35, and approximately 1.8 miles southwest of the City of New Braunfels, Comal County, Texas 78132. The effluent is discharged from the storm

water settling pond through a controlled weir and into a 24-inch concrete pipe; then to Dry Comal Creek; then to the Comal River in Segment No. 1811 of the Guadalupe River Basin. The unclassified receiving waters have limited aquatic life use for Dry Comal Creek. The designated uses for Segment No. 1811 are high aquatic life use, contact recreation, public water supply/aquifer protection.

Procedural Background

The application was received on October 20, 2009, declared administratively complete on November 24, 2009, and declared technically complete on February 19, 2010. The Notice of Receipt of Application and Intent to Obtain Permit (NORI) was published in the *New Braunfels Herald-Zeitung* on December 6, 2009. The Notice of Application and Preliminary Decision (NAPD) was published in the *New Braunfels Herald-Zeitung* on June 1, 2010. The public comment period closed on July 1, 2010. This application was administratively complete on or after September 1, 1999; therefore, this application is subject to the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999.

COMMENTS AND RESPONSES

COMMENT 1:

Janis Rosebush, Tim and Sharlene Fey, and Joseph Hager commented that an increase in suspended solids and contaminants in the discharge from CEMEX into the Dry Comal Creek could cause flooding and extend the stream reach and would degrade aquatic life uses, endanger aquatic life, and place the Comal River, Comal Springs, Guadalupe River, the heart of New Braunfels and rural subdivisions at risk. Ms. Rosebush is also concerned about residue problems and silt buildup.

RESPONSE 1:

The draft permit includes the same effluent limits as in the existing permit for all parameters, including total suspended solids. These limits are more stringent than the limits in 40 C.F.R. Part 411 relating to effluent limitation guidelines for Cement Manufacturing Point Source Category. Effluent limits for other parameters are based on the best professional judgment (BPJ) for this cement manufacturing facility. The permit amendment does not authorize any increase in the concentrations of suspended solids and contaminants in the discharge from the facility.

In accordance with 30 TAC § 307.5 and the TCEQ implementation procedures (IPs, January 2003) for the Texas Surface Water Quality Standards (TSWQS), an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. This review has preliminarily determined that no water bodies with exceptional, high, or intermediate aquatic life uses are present within the stream reach assessed; therefore, no Tier 2 antidegradation determination is required. No significant degradation of water quality is expected in water bodies with exceptional, high, or intermediate

aquatic life uses downstream, and existing uses will be maintained and protected.

Finally, the TCEQ has no jurisdiction to address flooding issues in the wastewater permitting process, unless there is a potential impact to water quality. The permitting process is limited to controlling the discharge of pollutants into water in the state and protecting the water quality of the state's rivers, lakes, and coastal waters. The draft permit includes effluent limits and other requirements that the Applicant must meet, even during rainfall events. For flooding concerns, please contact the local floodplain administrator for this area. If you need help finding the local floodplain administrator, please call the TCEQ Resource Protection Team at 512/239-4691.

COMMENT 2:

The City of New Braunfels is concerned that the uses of Comal River and Guadalupe River by the City, Schlitterbahn, other government entities, citizens and visitors, which are downstream from the point of discharge from this permit, could be impacted by the proposed permit. The City had general concerns about the water quality. Joseph Hager also asked if the local habitat will be safe and healthy for wildlife and endangered species, for hikers and bikers and for county residents. Tim Fey and Sharlene Fey and Joseph Hager commented about the impact of the discharge on the Dry Comal Nature Trail which is located with its trailhead about 1.5 to 2 miles downstream from the facility.

RESPONSE 2:

The ED's technical review of the permit application begins with a review by the Water Quality Assessment (WQA) Section. The WQA Section determines the designated uses of the segment or water body that would receive the proposed discharge, the critical conditions for the water body (i.e., low flow) when it is most susceptible to adverse effects, the limitations to ensure that the dissolved oxygen criteria are met, and the whole-effluent toxicity testing requirements. Upon completion of the review, the WQA Section provides recommendations that are used to develop requirements in the draft permit.

The TSWQS found in 30 TAC, Chapter 307 state that "surface waters will not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life." The methodology outlined in the IPs is designed to ensure compliance with 30 TAC, Chapter 307. The proposed permit has been drafted in accordance with 30 TAC, Chapter 307 and the IPs, and should be protective of aquatic life and human health in the receiving stream when the Applicant operates and maintains the facility according to TCEQ rules and the draft permit requirements.

In addition, as stated above, a Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action, and numerical and narrative criteria to protect existing uses will be maintained. No significant degradation of water quality is expected in water bodies with exceptional, high, or intermediate aquatic life uses downstream, and

existing uses will be maintained and protected. Endangered species are discussed in Response 9 below.

Also, Other Requirement No. 12 has been added to the draft permit to require the Applicant to sample the initial discharges from the newly added areas of the facility and analyze them for a series of pollutants to be screened against the concentrations necessary to protect the receiving water. If the permit is issued, the effluent data will be compared against the permit limits to ensure protection of aquatic life in the receiving stream and to protect the designated uses of the receiving water. If the effluent data shows pollutants that have the potential to exceed the water quality criteria, a permit amendment will be initiated by TCEQ staff and additional monitoring, effluent limits, and other controls may be added to the permit.

COMMENT 3:

Tim and Sharlene Fey and Joseph Hager expressed concern about the cumulative impacts on the Dry Comal Creek from other quarries along the creek together with runoff from development along IH 35 and other roadways.

RESPONSE 3:

Various facilities currently operate in and around the Dry Comal Creek watershed. The facilities are permitted to discharge to Dry Comal Creek only in accordance with the limitations and monitoring requirements that have been established to protect the receiving waters. Dry Comal Creek is not currently listed on the State's inventory of impaired and threatened waters (the 2008 Clean Water Act Section 303(d) list) and no cumulative impact assessment is proposed for the segment. Existing water quality uses in Dry Comal Creek will not be impaired and existing uses will be maintained.

COMMENT 4:

The City of New Braunfels commented that although the Applicant has a good compliance history, it is concerned with the magnitude of the plant expansion and the increase of discharge that the amendment will allow, and about the need for such increase.

RESPONSE 4:

The discharge flow rate in the draft permit is intermittent and flow variable, and in this major amendment request, the Applicant is not requesting an increase in that rate. The draft permit, if issued, would not allow for an increase in the amount or volume of water that the Applicant is currently permitted to discharge. One purpose of the major amendment is to allow the Applicant to discharge storm water from two new areas of the facility. Storm water is defined in 30 TAC § 307.3(a)(63) as rainfall runoff, snow melt runoff, surface runoff, and drainage.

COMMENT 5:

Tim and Sharlene Fey asked if the efforts of Federal and State governments to protect El Camino Real de los Tejas, a national historic trail, of which the Dry Comal Creek is an integral part, have been taken into account when analyzing the impacts of the proposed amended permit?

RESPONSE 5:

All new TPDES permits and permits requesting expansion of facilities are reviewed by the Texas Historical Commission (THC). If a facility is located in an area where historical or archeological artifacts might be disturbed, the THC asks for, and gets from the Applicant, a general survey of the plant site, effluent pipeline, access roads, utility lines, and construction easements, and a detailed survey should any concentration of artifacts be discovered by the general survey. The survey must be conducted by a qualified professional archeologist approved by the THC. The TCEQ is not apprised of the results of such surveys, but only receives a clearance letter once the survey results are approved by the THC. THC has not indicated that this facility or the two proposed new areas are located within an area with historical implications.

COMMENT 6:

Tim and Sharlene Fey commented that although the Applicant's proposed outfalls may lie downstream, they would be adversely affected due to their property's location and the negative stigma from having industrial wastewater and other discharges in the immediate vicinity. In their view, the thought of having an industrial discharge into a stream damages the entire stream and the damaging reputation would hurt their property, community, quality of life, and their efforts to preserve their heritage farm, wildlife, and environment. Finally, the Feys state that the discharge will entice more waste and trash to be thrown into the creek bed.

RESPONSE 6:

The TCEQ's jurisdiction is established by the Legislature and is limited to the issues set forth in statute. Accordingly, the TCEQ does not have jurisdiction to consider property values, quality of life, and negative stigma when determining whether to approve or deny an industrial wastewater permit application. However, the scope of the Agency's regulatory jurisdiction does not affect or limit the ability of a landowner to seek relief from a court in response to activities that interfere with the landowner's use and enjoyment of his property.

COMMENT 7:

The City of New Braunfels commented that if granted, the amendment will impact the diversion of state water from the Comal River which the City holds rights for. It also questions

whether the discharge as proposed will jeopardize its interests in water supplies.

RESPONSE 7:

TWC § 26.027 authorizes TCEQ to issue permits to control the discharge of wastes or pollutants into state waters and to protect the water quality of the state's rivers, lakes and coastal waters. The wastewater permitting process is limited to controlling the discharge of pollutants into water in the state. The draft permit would not regulate water rights or authorize diversions of state water. The TCEQ does not consider water rights in its determination of whether to issue a wastewater discharge permit.

COMMENT 8:

Tim and Sharlene Fey do not agree that the unclassified receiving waters have limited aquatic life use for the Dry Comal Creek. It is their understanding that intermittent streams in the area have immediate or high aquatic life uses. They state that aquatic life has been present and observed in the Dry Comal Creek that runs through their land, so they believe that there is also life in the proposed receiving waters. They think that if there is none, it may be an indication of the degradation already taking place due to existing wastewater and storm water from industries and development in the area.

RESPONSE 8:

Dry Comal Creek is assigned a limited aquatic life use due to the intermittent nature of the Creek. This designation does not imply that there is no life in the Creek or that conditions are degraded. The combination of intermittent stream flows (i.e., hot, dry conditions; flash flooding) and relatively uniform habitat characteristics naturally limits the diversity and abundance of aquatic-dependent biota in the creek. Biota is generally the species composition, diversity, and functional organization of a community of organisms in a water body or region.

COMMENT 9:

Tim and Sharlene Fey and Joseph Hager believe that independent studies should be done on the Dry Comal Creek, particularly taking into consideration its seep springs. They also state that the surrounding wetlands and habitats should be studied, particularly as it serves as nesting areas for wildlife and endangered species.

RESPONSE 9:

Review of geological maps of the Dry Comal Creek watershed indicate that the CEMEX facility is not located in the Edwards Aquifer Recharge Zone and will not impact caves, natural springs, or wetlands in the area.

The Memorandum of Agreement (MOA) between the Commission and the United States Environmental Protection Agency (EPA, Region 6), requires the Commission to address endangered

species issues through interagency coordination. The following excerpts from the MOA delineate the Commission's role with respect to endangered species concerns:

The Commission will involve "the United States Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), and Texas Parks and Wildlife Department (TPWD) during the permitting process to address endangered species issues in TPDES permit."

The Commission "will address the effects on endangered species . . . through setting and enforcing water quality standards which undergo EPA approval with USFWS, NMFS . . . and TPWD consultation." The Commission will "consider endangered species issues . . . identified by NMFS, USFWS."

If USFWS, NMFS, or TPWD comments during the public comment period to express endangered species concerns, the Commission will coordinate with commenting agency to "resolve the relevant issues."¹

The Peck's Cave amphipod, *Stygobromus pecki*, and the Comal Springs dryopid beetle, *Stygoparnus comalensis*, are two endangered species identified in the watershed of Segment 1811, but species distribution information for Segment 1811 watershed provided by the USFWS documents that both species are present solely in the vicinity of Comal Springs in Comal County, which is further upstream in the watershed from this facility. The fountain darter, *Etheostoma fonticola*, an endangered aquatic species, has been determined to occur in the watershed of Segment 1811. Neither the USFWS, NMFS, or TPWD commented on the draft permit during the public comment period. EPA, Region 6 reviewed the draft permit and had no objections to its issuance.

COMMENT 10:

Tim and Sharlene Fey request that the review of this proposed amendment/renewal be coordinated with local, state, and federal agencies that may have interests in the historical and cultural aspect of the area.

RESPONSE 10:

Information submitted with Supplemental Permit Information Form (SPIF) is sent to other state agencies as required by the TCEQ Memorandum of Agreement with the EPA. For this permit, the SPIF was sent to the U.S. Fish and Wildlife Service, Texas Parks and Wildlife Department, and Army Corps of Engineers-Fort Worth for review and comment, and no comments were received from any of those agencies. The following local authorities received mailed notice of the permit application: the mayor and health authorities of the city or town in which the facility is located or in which waste is disposed of; and the county judge and health authorities of the county in which the

¹ See, MOA between TNRCC and U.S. EPA, pp. 27, 33-35 (Executed September 14, 1998).

facility is located or in which waste is disposed. *See* 30 TAC § 39.413(2) and (3). Other state and local agencies, along with any other interested parties, have the opportunity to review the copy of the draft permit that is placed at the public place for viewing, and to provide comments on the draft permit.

CHANGES MADE TO THE DRAFT PERMIT IN RESPONSE TO COMMENT

No changes were made in response to public comment. However, corrections were made to reflect proper citation format, and grammatical and typographical errors.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Robert Martinez, Director
Environmental Law Division



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